> Based on the foregoing, the Court find that the challenged transfers–the North County Road transfer of July 30, 1999, the artwork and furnishings transfer of October 10, 1999, the $2 million transfer of October 10, 1999, the Blossom transfer of November 14, 2000, the $3.1 million transfer of the Gulfstream proceeds, the February 5, 2001 transfer of $600,000–were made with the actual intent to hinder, delay, and defraud creditors. The transfers were constructively fraudulent. Ms. Gosman did not provide reasonably equivalent value in exchange for the transfers, and Mr. Gosman was insolvent at the time of each of the transfers. Moreover, Mr. Gosman was not paying his debts as they came due at the time of each of the transfers, and each transfer deepened Mr. Gosman's insolvency. The transfers had the added effect of leaving Mr. Gosman with inadequate capital. Therefore, all of the transfers are avoided under Fla. Stat. § 726.105. In addition, the Blossom transfer, the $3.1 million transfer of the Gulfstream proceeds, and the February 5, 2001, transfer are avoided under Section 548 of the Bankruptcy code because they occurred within one year of the petition date.
>
> Lessen Order at 42.
>
> As previously determined, Mr. Gosman transferred property to himself and Mrs. Gosman as tenants by the entirety with the intent to hinder, delay, or defraud creditors.
>
> Lessen Order at 44.

B. The Trustee's allegations in the adversary proceeding against Peabody & Arnold

The adversary proceeding on appeal was brought by the Trustee against the law firm of Peabody & Arnold and Joel Reinstein. The Second Amended Complaint includes the following counts: (1) professional malpractice against Peabody and Vigoda (Count I); professional malpractice against Reinstein (Count II); (3) conspiracy to defraud creditors (Count III); conspiracy to commit fraudulent asset conversion (Count IV); conspiracy to breach fiduciary duty (Count V); and aiding and abetting a breach of fiduciary duty (Count VI). The only Count at issue in this appeal is Count I, and the Trustee makes the following allegations in support of that claim:

> 52. Peabody breached the duties it owed and failed to protect the interests of the Debtor by, among other things:
> (1) negligently failing to advise Gosman that he was not in default of the Antenuptial Agreement as he had in fact funded the Marital Trust;
> (2) negligently failing to advise Debtor that alternative methods to fund the Marital Trust were available to him;
> (3) negligently failing to advise Debtor that no consideration existed for the transfers of the artwork and $2 million in cash to Mrs. Gosman in light of the prior deeding of the North County Road property to ownership by tenancy by the entireties;
> (4) failing to scrutinize and disclose to Debtor that the actions he was undertaking constituted fraudulent conveyances, fraudulent asset conversions, and breaches of fiduciary duty which would block any discharge of the Debtor in the event of a subsequent bankruptcy filing; and
> (5) failing to withdraw from representing Debtor.

Second Am. Compl. ¶ 52.

In support of Count III for conspiracy to defraud, the Trustee makes the following allegation:

> 78. Each of the Defendants conspired with each other and with Mr. Gosman and Mrs. Gosman to accomplish the breaches of fiduciary duty that Mr. Gosman owed to his creditors. Moreover, without the assistance and participation of the Defendants, no breach of fiduciary duty would have occurred.

Second Am. Compl. ¶ 78.

In addition, the Trustee included the following determinations by Judge Lessen in the allegations in its Second Amended Complaint:

> 47. On March 1, 2005, the United States District Court for the Southern District of Florida entered an opinion finding that the transfers of the North County Road property, the artwork on October 10, 1999, the $2 million on October 10, 1999, the $3.1 million from the sale of the Gulfstream III, and $600,000 on February 5, 2001, were made with actual intent to hinder, delay and defraud creditors at a time the Debtor was insolvent. The Court also found that the transfers were constructively fraudulent. The Court also found that the transfers of assets from Mr. Gosman into ownership between Mr. Gosman and Mrs. Gosman as tenants by the entireties violated the Florida

Fraudulent Asset Conversion Statute, Section 222.30, Florida Statutes.

48. On March 1, 2005, pursuant to the Opinion, the Court entered judgment avoiding the transfers and ordering a turn over to the Trustee and awarding compensatory damages against Mrs. Gosman in the amount of $66,539,181.01.

Second Am. Compl. ¶¶ 47-48.

C. The ruling by the Bankruptcy Court and the issues on appeal

As stated above, the Bankruptcy Judge dismissed Counts I, III and IV under the doctrine of *in pari delicto*, based on the ruling in the adversary proceeding brought by the Trustee against Mr. and Mrs. Gosman. The Bankruptcy Judge also dismissed Counts III and IV for the additional reason that Florida does not recognize an independent action for conspiracy. According to the Order, the Trustee's Second Amended Complaint did not allege an actionable underlying tort or wrong which could provide the basis for the Trustee's claims for conspiracy, and therefore Counts III and IV failed to state a claim upon which relief could be granted. Order at 5.

The Bankruptcy Court had previously dismissed Counts V and VI, and on May 17, 2007, the Bankruptcy Court approved the settlement of Count II against Joel Reinstein. Therefore, no claims remain in the Second Amended Complaint.

The Trustee appeals the Bankruptcy Court's Order here, and argues that (1) an attorney who provides negligent advice to a client should not be relieved of liability where the client did not seek advice on how to violate the law or defraud creditors; and (2) the *in pari delicto* doctrine requires a fact-based review and a determination that the parties were at equal fault, and this issue cannot be resolved on a motion to dismiss. Initial Br. at 13.

Because the Trustee's briefs only address the Bankruptcy Court's rulings on the *in*

pari delicto doctrine, and not its rulings on the conspiracy claims, I address only whether the Bankruptcy Court erred in dismissing Count I under the *in pari delicto* doctrine. I do not address the Bankruptcy Court's dismissal of Counts III and IV because those Counts were dismissed for the additional reason that the Trustee had not alleged an actionable tort or wrong which could provide the basis for its conspiracy claims.

II. Standard of review

District courts sit as appellate courts over bankruptcy decisions. *Miner v. Bay Bank & Trust Co.* (*In re Miner*), 185 B.R. 362, 365 (N.D. Fla. 1995), aff'd, 83 F.3d 436 (11th Cir. 1996). A district court reviews a bankruptcy court's legal conclusions de novo, *In re Englander*, 95 F.3d 1028, 1030 (11th Cir. 1996), and a bankruptcy court's factual findings for clear error, Fed. R. Bankr. P. 8013; *In re Gamble*, 168 F.3d 442, 444 (11th Cir. 1999).

When district courts review the factual findings of a bankruptcy court, the burden of showing that the bankruptcy court's findings are clearly erroneous is upon the appellant. *Acquisition Corp. of Am. v. Fed. Sav. & Loan Ins. Corp.*, 96 B.R. 380, 382 (S.D. Fla. 1988). A finding of fact is not clearly erroneous unless "this court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been committed." *IBT Int'l, Inc. v. N.* (*In re Int'l Admin. Serv., Inc.*), 408 F.3d 689, 698 (11th Cir. 2005) (internal citations omitted).

III. Discussion

In the Eleventh Circuit, in order to dismiss a complaint with prejudice, a court must determine that even an amended complaint could not state a claim. *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1213 (11th Cir. 2001) ("[I]f a more carefully drafted complaint

could not state a claim, dismissal with prejudice is proper.") (internal quotations omitted).

A. The Bankruptcy Court properly dismissed Count I based on *in pari delicto*.

Here, I review the Bankruptcy Court's application of the *in pari delicto* doctrine *de novo*, accepting all factual allegations as true and construing them in the light most favorable to the Trustee. *Powell v. Barrett*, 496 F.3d 1288, 1304 (11th Cir. 2007). The doctrine of *in pari delicto* is an affirmative defense and an equitable defense, *May v. Nygard Holdings Ltd.*, 2007 WL 2120269, *4 (M.D. Fla. July 20, 2007) (citing *Nisselson v. Lernout*, 469 F.3d 143, 151 (1st Cir. 2006), and a complaint can be dismissed on an affirmative defense when "the allegations in the complaint, on their face, show that an affirmative defense bars recovery on the claim." *Powell*, 496 F.3d at 1304; *see Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1277 (11th Cir. 2004) ("[T]he Florida courts have also made it abundantly clear that any affirmative defense . . . may be considered in resolving a motion to dismiss when the complaint affirmatively and clearly shows the conclusive applicability of the defense to bar the action.") (internal quotations omitted).

Federal bankruptcy law controls the rights and interests of a bankruptcy trustee. *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149-1150 (11 th Cir. 2006) As the representative of an estate, the trustee "succeeds into the rights of the debtor-in-bankruptcy and has standing to bring any suit that the debtor corporation could have brought outside of bankruptcy." *Edwards*, 437 F.3d at 1149. The debtor estate "includes all legal or equitable interests of the debtor as of the commencement of the case." *Id.* at 1150 (citing 11 U.S.C. 541(a)). Because the trustee does not acquire greater interests or rights than the debtor, "[i]f a claim of [the debtor]

would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense." *Edwards*, 437 F.3d at 1150, 1152 ("The equitable defense of *in pari delicto* is available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor."; *O'Halloran v. PriceWaterhouseCoopers LLP*, 2007 WL 1296027, *6 (2d DCA May 4, 2007). Therefore, the Trustee stands in the shoes of the Debtor, Mr. Gosman, and the defense of *in pari delicto* will bar the Trustee's action against Peabody if it could have been raised against the Debtor.

Because the Trustee's claim in Count one is a state law negligence or malpractice claim, Florida law applies in determining what defenses may be asserted against the Trustee. *Tolz v. Proskauer Rose (In re Fuzion Techs. Group, Inc.)*, 332 B.R. 225, 234 (S.D. Fla. 2005). Under Florida law, the doctrine of *in pari delicto* operates to bar legal remedies when both parties are equally in the wrong, *May*, 2007 WL 2120269, at *4 (citing *Turner v. Anderson*, 704 So. 2d 748 (4th DCA 1998), or where the plaintiff had greater responsibility for the wrongdoing than defendant. *O'Halloran*, 2007 WL 1296027, at *4 ("In its classic formulation, the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury.")

Furthermore, "[e]ven if the parties did not participate in the *same* wrongdoing, Florida also follows a general principle that no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or found any claim upon his own iniquity, or profit by his own crime." *May*, 2007 WL 2120269, at *4 (emphasis in original). In determining whether *in pari delicto* applies, "a courts first determines whether the plaintiff's